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In The

Supreme Court of the United States

79-1770

October Term, 1979

No.

UNITED STATES OF AMERICA,

vs.

ROBERT SWINEHART,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In The

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October Term, 1979

No.

UNITED STATES OF AMERICA,

vs.

ROBERT SWINEHART,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner prays that a writ of certiorari be issued to review a judgment and order of the United States Court of Appeals for the Third Circuit in this case issued on January 17, 1980.

OPINIONS BELOW

The opinions of the Court of Appeals (Appendix A, *infra* at 1a-12a; Appendix C, *infra* at 15a) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra,* 13a-14a) was entered on January 17, 1980 and a petition for rehearing was denied on March 7, 1980 (Appendix C, *infra,* 15a). On April 7, 1980 an order was entered by the United States Court of Appeals for the Third Circuit staying issuance of the mandate until May 6, 1980 (Appendix D, *infra,* 16a) and on April 4, 1980, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including May 6, 1980 (Appendix E, *infra,* 17a). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Government's conduct in inducing Mr. Swinehart's attorney surreptitiously to record both private and telephonic conferences between them and to use them to double the sentence otherwise agreed upon was such a pervasive intrusion on petitioner's constitutional right privately to consult with his lawyer so as to destroy the adversary system and to perpetrate a fraud on the court.

CONSTITUTIONAL PROVISIONS INVOLVED

Whether the conduct of petitioner's attorney in recording his client's incriminating statements at the Government's request and communicating them to the Government, violated petitioner's Sixth Amendment right to counsel, his Fifth Amendment right of due process and/or his Fourth Amendment right of privacy.

STATEMENT

In an indictment filed on June 29, 1978, the Grand Jury for the Eastern District of Pennsylvania returned an indictment, under Criminal No. 78-217 charging your petitioner and others with several counts of embezzlement from employee benefit

plans (18 U.S.C. §1664) bankruptcy fraud (18 U.S.C. §152) and related offenses. During hearings conducted on pre-trial motions to dismiss and suppress arising out of alleged improper use by the Government of immunized testimony given by defendant and others, the Government was attempting to prove that certain evidence was free of taint. During this phase of the proof, on October 4, 1978, the Government for the first time advised and supplied defense counsel with copies of surreptitiously recorded telephone and personal conversations recorded through the use of a body recorder between your petitioner Swinehart and his then attorney Arthur Kafrissen. Petitioner was then a target of the Government's investigation. There were three conversations (Appendix F, *infra,* 18a): two phone and one body. During cross-examination, Kafrissen admitted that the recordings were of his former client (Appendix F, *infra,* 19a). The FBI suggested to attorney Kafrissen the areas to be covered during the questioning (Appendix F, *infra,* 20a).

During the conversation wherein the attorney wore the body recorder (the transcript of which bears the date October 27, 1976), your petitioner and attorney Kafrissen were discussing a proposed business venture; your petitioner was requesting advice on its legality. That transcript clearly indicates that the client specifically mentioned the proposed business venture and specifically said he would not undertake it unless in the lawyer's opinion it was legal. The conversations are summarized at Appendix G, *infra,* 22a, 23a and 24a. During that conversation, the attorney carried out the request of the FBI and obtained incriminating information from his client. Ultimately, the indictments were handed down.

During the pre-trial hearings when this information first surfaced, the Government advised defense trial counsel that it would not use the transcripts. *See* affidavit of trial defense counsel in the Appendix H, *infra,* 25a and 26a.

After the pre-trial motions were denied, ultimately defendant entered into a plea agreement with the Government.

The terms are summarized in the opinion below. The bargained-for sentence was 18 months. Defendant contended that as part of the original plea bargain, he had negotiated out a condition that he "*take and pass*" the polygraph, and that he merely *take* it. This, the Court of Appeals for the Third Circuit held, constituted the single question presented on the appeal. It remanded the case for further proceedings on this issue; one judge dissented and held that the issue of attorney-client privilege should also be considered.

The majority held in a footnote that this issue "is not implicated in this appeal" and saw no reason for requiring, as the minority opinion suggested, any further consideration of it.

The majority suggested as reasons for that conclusion that there was no proof that the District Court relied on the tapes.

After the guilty pleas were accepted, the colloquy from the sentencing notes of testimony indicate that a witness read directly into the record the tapes themselves or paraphrased their contents in the following pages: 217, 218, 220, 222, 223, 224, 226, 228, 229, 230, 231, 232, 254, 259, 266, 267, 271, 286, 289, 290 (Appendix I, *infra,* 27a-41a). This adequately demonstrates that the trial court took them into consideration.

The second reason that the court gave was that Swinehart never objected to the introduction of the tapes on attorney-client grounds at the suppression hearing. At the sentencing colloquy (Appendix I, *infra,* 27a), Mr. Kidd, defendant's defense attorney, specifically objected to the introduction of the evidence on the basis of the attorney-client privilege and was overruled.

Thirdly, the Court of Appeals opined that the issue had not been previously raised in the court below.

That issue could not have been raised in the court below for the reason that defendants had tendered a guilty plea which was the subject of the plea bargain agreement. Had the plea bargain

been specifically enforced, the defendant would have waived the right to argue that issue. It was only after the guilty pleas had been accepted and the defendants engaged in extensive cooperation with the Government that the Government revealed that it had in fact used the tapes (contrary to its assertion to defense counsel) when it compared the answers given on the polygraph results with the taped answers given by defendant to his attorney. As soon as this became evident, trial counsel filed a motion to withdraw or to specifically enforce the plea agreement. It was after counsel discovered that the Government "used" the surreptitiously recorded documents to double the agreed upon sentence that the objection was lodged on the basis of the attorney-client privilege.

In a petition for reargument before the court en banc, the above matters were brought to the court's attention, and it was suggested that the reasoning in the footnote to the opinion may have overlooked those parts of the record, and therefore were improvidently made. Nevertheless, reargument was denied.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Third Circuit has recently held in *United States v. Morrison,* 602 F.2d 529 (1979) that the proper remedy for improper intrusion into the relationship between a defendant and his counsel is to dismiss the indictment with prejudice. A petition for certiorari has been filed by the Government in that case and is pending.

Similarly, in *United States v. Levy,* 577 F.2d 200 (3d Cir. 1978) it was found that mere disclosure of attorney-client confidences required the dismissal of the indictment without regard to whether there was any prejudicial effect on the outcome of the trial. *See also, United States v. Peters,* 468 F.S. 364 (S.D. Fla. 1979; *Mastrain v. McManus,* 554 F.2d 813 (8th Cir. 1977); *United States v. Orman,* 417 F.S. 1126 (Colo. 1976).

Not only did the FBI importune defendant's attorney to wear a body recorder and record both private and telephonic conversations, the Government subsequently advised trial defense counsel that they would not be used. Thereafter, the Government in fact used them to compare answers given in a subsequent polygraph examination, the effect of which was ultimately to double defendant's sentence to a period of three years' incarceration as opposed to that called for in the plea agreement of 18 months.

That this is specific prejudice cannot be denied. Under the test in *Morrison, supra,* specific prejudice is not necessary but in the case at bar it is present. In *Morrison,* the court said at page 533:

> "Because an attempt to assess the prejudice to the defendant would have been speculative at best, we held that the intrusion and mere disclosure, without more was sufficient to make out a Sixth Amendment violation. In light of the fact that no other relief would remedy the violation, and considering the extent and seriousness of the improper conduct of the Government, we found the only appropriate relief for the violation to be dismissal of the indictment."

In citing *Via v. Cliff,* 470 F. 2d 271 (3d Cir. 1972) and *Gallarelli v. United States,* 441 F. 2d 1402 (3d Cir. 1971), the court noted that the *Morrison's* Sixth Amendment violation fit the pattern of the Sixth Amendment violations from those two cases and, quoting from *Glasser v. United States,* 315 U.S. 60, 76, 62 S. Ct. 457, 467, 86 L. Ed. 680 (1942), noted that the Government had failed to appreciate that the fundamental concept of the Sixth Amendment was absolute.

The policy of law underlying a criminal defendant's attorney-client privilege is founded upon the fundamental rights mandated under the Fourth, Fifth and Sixth Amendments to the

United States Constitution. The Sixth Amendment guarantees every defendant the right to enjoy the effective assistance of counsel.

> "It is well established that an accused does not enjoy the effective aid of counsel if he is denied the *right of private counsultation with him.*" (Emphasis added.) *Coplon v. United States,* 191 F. 2d 749 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 926 (1952).

The Fourth Amendment commands officers of the government to comply with basic procedural requirements before the innermost secrets of one's home or office are invaded. *Berger v. New York,* 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967). These corollary rights are insured under the Fifth Amendment's due process clause.

> "A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed. No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel, or any other element of due process of law without which he cannot be deprived of life or liberty." *Coplon v. United States, supra* at 751.

Consequently, a conviction obtained through an intrusion by the government upon the confidential relationship of a defendant and his counsel is constitutionally defective and cannot stand. *Weatherford v. Bursey,* 429 U.S. 545, 558, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977); *Black v. United States,* 385 U.S. 26, 87 S. Ct. 190, 17 L. Ed. 2d 26 (1966); *Hoffa v. United States,* 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966); *Silverman v. United States,* 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 414 (1961).

The applicable standard for determining whether a constitutional violation of a defendant's right to the effective assistance of counsel has occurred was outlined by the Supreme Court in *Weatherford v. Bursey*. Weatherford was an undercover agent masquerading as a cohort of defendant Bursey during an investigation of certain political activities. Both were arrested for vandalizing a selective service office. In order to maintain his undercover status, Weatherford met with defendant Bursey and his attorney to discuss the upcoming trial. The agent communicated nothing at all to his superiors or to the prosecution about the accused's trial plans.

The Supreme Court found that an agent's mere meeting with the accused and his attorney was not per se a violation of defendant's attorney-client relationship. "As long as the information remained uncommunicated, he posed no substantial threat to Bursey's Sixth Amendment rights." *Weatherford v. Bursey, supra* at 556.

The test construed by the Court requires a communication of an attorney-client conversation which creates at least a "realistic possiblity" of *injury* to a defendant or benefit to the government to constitute an unconstitutional invasion.

> ". . . unless Weatherford communicated the substance of the Bursey-Wise (attorney) conversations and thereby *created at least a realistic possibility of injury to Bursey or benefit to the government,* there can be no Sixth Amendment violation." (Emphasis added.) *Weatherford v. Bursey, supra* at 558.

Noting that the use of informants placed a "special responsibility" on the FBI, the Justice Department has issued the following guidelines:

> "In considering the use of informants in an authorized investigation the FBI should weigh the following factors —

> 1. the risk that use of an informant in a particular investigation or the conduct of a particular informant may, contrary to instructions, *violate individual rights, intrude upon privileged communications,* unlawfully inhibit the free association of individuals or the expression of ideas, or compromise in any way the investigation or subsequent prosecution . . . ." (Emphasis added.) 20 Crim. L. Wk. 2337 (Jan. 19, 1977).

Such conduct shocks the public conscience and does not comport with the procedural standards commanded by the due process clause. As a consequence, both the institution of the prosecution and the indictments derivatively produced against appellant are defective and cannot result in a constitutionally valid conviction.

> ". . . High motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of a crime and his counsel. *The Constitution's prohibitions against unreasonable searches, and its guarantees of due process of law and effective representation by counsel, lose most of their substance if the government can with impunity place a secret agent in a lawyer's office, to inspect the confidential papers of the defendant and his advisers to listen to their conversations, and to participate in their counsel of defense . . . if it does occur a conviction tainted by it cannot stand." (Emphasis added.) Caldwell v. United States,* 205 F. 2d 879, 881 (D.C. Cir. 1953). Cited as authority in *Weatherford v. Bursey, supra* at 553 and *Hoffa v. United States, supra* at 306.

In *Probliner v. Fogg,* 438 F.S. 890 (S.D.N.Y. 1977) it was held that once defendant shows prejudice under *Weatherford,*

the government must establish *beyond* a *reasonable doubt that mere suppression cures any taint. Not only was there no suppression,* but the learned trial court adopted the Government's use of Mr. Swinehart's statements and doubled the otherwise agreed to sentence. This was the obvious prejudice.

What is the appropriate sanction when such a violation has occurred?

Where the overhearing is inadvertent and non-prejudicial, as might occur when the monitoring agents did not realize the identities or relationship of the speakers, and they terminated the interception immediately upon becoming aware of the potentially privileged nature of the conversation, suppression is probably an adequate remedy. No greater sanction would avoid future interceptions in similar circumstances. But the government should be required to show by a high standard of proof that its inadvertence and ignorance of identities existed despite all reasonable safeguards, and that in fact, no prejudice occurred. *Government Interceptions of Attorney-Client Communications,* 49 N.Y.U. L.R. 87 at 103-6.

If any one of these elements is not shown by the government, *more severe sanctions appear necessary* to protect the *fundamental interest of confidentiality* by encouraging maximum precautions against improper interception of privileged communications. Intentional overhearing, though nonprejudicial, should require *at least* a new trial. *See O'Brien v. United States,* 386 U.S. 345. As with the exclusionary rule in a conventional search case, the sanction is intended to deter the initial governmental illegality. But the interest affected requires even *greater* protection in view of the secrecy of an electronic search, its pervasive character, and the danger it poses to open discourse — especially between lawyer and client.

Deterrence of intentional interception of privileged communications cannot be accomplished by merely applying

the exclusionary rule, which is occasionally attempted, United States v. Brown, 484 F. 2d 418 (5th Cir. 1973). The threat of its imposition can hardly be an effective deterrent. Therefore, if suppression is the only sanction, the monitoring officer has nothing to lose by interception of privileged conversations, and he *will be encouraged to listen, rather .han be deterred.*

To order a new trial results, in practical effect, in suppression. The new trial sanction disregards the potential for enduring prejudice to the defendant from the government's penetration of his confidential communications, especially those with his attorney. *People v. Probliner,* 32 N.Y. 2d 356.

In *Government Interceptions of Attorney-Client Communications,* 49 N.Y.U. L.R. 87 at 90, the following appears (citation omitted):

> "The most difficult case is presented when the intercepted communication deals with strategic aspects of the defense. These discussions might concern any number of topics, such as the psychological strengths and weaknesses of the defendant, of prospective witnesses and even of the attorneys; the effects of certain evidence on other trials; ploys to entrap the prosecution; and possible grounds for appeal. In an adversary system, where style, psychology and strategy play an important role, the prosecution's knowledge of and resulting ability to neutralize the defense strategy can be as harmful to the accused as knowledge of incriminating facts. Here, too, the intrusion may affect only the trial at hand if relatively unimportant insights can be gained from the interception, for instance, if the prosecution discovers only a discarded strategy. However, the government may also discover the defendant's primary strategy, thereby forever

depriving him of its full effectiveness. Unfortunately, most courts seemed oblivious to this unpleasant reality.

Elements of a Proper Judicial Approach

At this point, the elements of a proper judicial approach to a government interception of attorney-client communications can be discerned. First, since important and sometimes damaging information must be exchanged in a defense conference, assistance of counsel can be effective only so long as communication between an accused person and his attorney are secure from government interception. If defendants realize that government may listen to their conversations with lawyers and may use information secured against them, they will be unwilling to communicate fully. If the public realizes that government may violate the Constitution without meaningful loss, its respect for both government and law may be diminished. And if the government may deprive defendants of their trial strategy, the adversary system will become a cruel ritual for relieving defendants of their liberty.

It should also be clear that any effective judicial attempt to remedy a governmental intrusion must seek to rectify fully both the societal and personal effects resulting from the intrusion. The key factors to determine the nature of those effects are respectively, the nature of the intrusion and the content of the communication intercepted and conveyed to the prosecution. If the intrusion is intentional, the social effects must be addressed and remedied. If the communication has revealed important information, a remedy must be fashioned so as to neutralize the effect on the

defendant of allowing government access to it. Realistic application of these basic postulates should adequately define and protect an accused person's right to the assistance of counsel.

Noncustodial Situations: The Initial Formulation

The lack of a general, developed analysis to deal with custodial interceptions of attorney-client communications meant that the first case to deal with a noncustodial situation had a significant impact on later adjudication. *Coplon v. United States* provided the first opportunity for judicial consideration of the effect of government interception of attorney-client communications on the sixth amendment right to effect assistance of counsel in a non-custodial context. The two rules developed in Coplon, while perhaps appropriate to the facts of the case, were less appropriate in the subsequent cases to which they were applied.

The No-Prejudice Rule

In Coplon, the defendant, convicted of espionage, moved for a new trial, alleging that agents of the Federal Bureau of Investigation had monitored telephone conversations between her and counsel both prior to and during trial. The District of Columbia Circuit Court of Appeals held that effective assistance of counsel necessarily required private consultations. The court found that any government interception of attorney-client communications violated the defendant's right to assistance of counsel, whether or not prejudice flowed from the interceptions. Concluding that no conviction can

stand when the government interferes with effective assistance of counsel, the court ordered a hearing to determine the truth of Coplon's allegations, stating that a new trial would be ordered if the allegations were true.

The Coplon court's assumption that all government intrusions interfere with the effectiveness of attorney-client communications does not, however, deal adequately with the actual effects of an interception. Since the standard does not demand that government activity actually hinder the accused's defense, it might be applied even when a government interception was both accidental and harmless to the accused. In such a case, the defendant would have received effective assistance of counsel, and the grant of a remedy would be neither constitutionally impelled nor necessary to protect the interests of the defendant or of society. Although the courts may devise a rule that punishes governmental misconduct regardless of its effect on a specific defendant in order to ensure that constitutional rights will be observed in other circumstances, such a rule should be applied only when meaningful — *that is, when government has knowingly intruded on defendant and his attorney.*

In order to support its unrealistic assumption, the District of Columbia Circuit relied upon the Supreme Court's statement in *Glasser v. United States* that 'the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' Read in light of the most recent precedent cited

for the support, however, the Glasser statement does not demand the elimination of all considerations of prejudice to the defendant; rather, it creates a rebuttable presumption that prejudice exists in cases of sixth amendment violations. Under Glasser, if the government were able to make an affirmative showing that no prejudice resulted from its interference with the privacy of attorney-client communications-the burden of proof being borne by the government due to the fundamental nature of the sixth amendment right-then there would be no denial of or interference with the accused's right to effective assistance of counsel. By construing Glasser to dispense with any inquiry into the effects of an interception by the government of a communication between a lawyer and his client, the Coplon court created a dilemma for courts which hesitated to grant relief for totally harmless government intrusions.

The Trial-Bar Rule

Perhaps realizing the expansive nature of the right it had created, the *Coplon* court attempted to restrict its decision by limiting the remedy it provided to the defendant. It established the trial-bar rule, according to which government interception of attorney-client communications invalidates only the trial before or during which the interception occurs. Considering the effects that such interceptions can have on the accused even in future trials, the uniform application of this widely adopted limitation ignores the true effects of an interception on a defendant, and, therefore, cannot serve to vindicate fully his sixth amendment right.

Soon after *Coplon,* the District of Columbia Circuit itself recognized that a government interception could have an effect on future trials. In *Caldwell v. United States,* the court stated in a footnote that a new trial would sufficiently remedy a government intrusion unless the defense showed that the government's action prejudiced the defendant in a manner which would 'necessarily render a subsequent trial unfair to the accused.' Since the chilling and socially demoralizing effects will be greatest in cases of clandestine activities, e.g., when the government has deliberately tapped the telephone of a defendant or his attorney, planted an agent in the defense camp or indicted sham defendants precisely because of their value as gatherers of privileged information about the strategy of the defense, courts should always penalize such 'gross' *conduct without inquiring into whether or not the defendant has been prejudiced by it. The appropriate step is to dismiss the charges against the defendant.* Both society as a whole and the courts in particular have a demonstrable interest in applying this drastic remedy. The societal interest lies in curbing abuses of governmental power. Demoralization of the citizenry is the inevitable consequence if the government can play the role of 'Big Brother' with impunity. The interest of the courts is narrower but nonetheless real. *Purposeful governmental intrusion into the privacy of attorney-client communications amounts to a subversion of the nation's entire system of criminal justice. Once this kind of intrusion occurs, the adversary process crumbles; the government has, in effect, perpetrated a fraud upon the courts.*"

In the concluding paragraphs, the author proposes a remedy in the most serious cases of intrusion by government.

We characterize the Government's conduct as most serious because we have been unable to find any case where the Government has induced the defendant's own attorney to make the recording. In *Hoffa,* the Supreme Court referred at 385 U.S. 306, to the intrusions of *Caldwell,* 209 F. 2d 879 and *Coplon,* 191 F.S. 749 as the "grossest" kind, and in neither of these two cases did the defendant's own attorney voluntarily reveal the confidential information.

Further, said the *Hoffa* Court (at 385 U.S. 308):

> "It is possible to imagine a case in which the prosecution might so pervasively insinuate itself into the counsels of the defense as to make a new trial on the same charges impossible under the sixth amendment."

Similarly, this Court in *United States v. Russell,* 411 U.S. 423, 431-32 (1973) said that "we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that *due process principles* would absolutely bar the government from invoking judicial process to obtain a conviction."

It is respectfully submitted that in the case at bar, unfortunately, that day has come.

In *United States v. Rosner,* 485 F. 2d 1213 (2d Cir. 1973) a co-defendant was an informer and the defendant requested dismissal without a showing of prejudice. The court said:

> "A per se rule must. . .be thought of in terms of sanction against the Government rather than as a search for truth. Illegal wiretapping may be so far beyond the bounds of Governmental

> propriety that it is offensive to a rule of liberty under law. (Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed 2d 576 (1967). The use of a dummy intrusion, is cut from the same cloth. (Citations omitted). The intrusion by a paid informer for the avowed purpose of listening to defense secrets is not different . . . .
>
> In all such cases the Government has been treated as ruthless beyond justification. It has stooped to conduct well below the line of acceptability. These strictures, while legal principles in constitutional terms, are also moral judgments. They assess the guilt not of the defendant but of the Government. The Supreme Court in the *Hoffa* case, considered *Coplon,* supra, and *Caldwell,* supra, so strongly urged upon us by appellant, as cases which 'dealt with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel.' Hoffa v. United States, supra, 385 U.S. at 306, 87 S.Ct. at 416. When the Government is found guilty of such a charge, the dereliction is more than the bungling of the constable, in Judge Cardozo's phrase. (People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926). *It is a corrupting practice which may justify freeing one guilty person to vindicate the rule of law for all others.* See Mr. Justice Holmes dissenting in Olmstead v. United States, 277 U.S. 438, 469, 48 S.Ct. 564, 72 L.Ed 944 (1928)." (Emphasis supplied.)

The Second Circuit opined that the use of a dummy defendant was the ultimate in chicanery of unlawful intrusion. Not even they could have forseen the egregious conduct initiated by the Government and carried out by defendant's attorney in the case at bar.

Under the circumstances, it is respectfully requested that prosecutorial misconduct cases originating from the Third Circuit be brought to a halt. As far back as 1972, in *United States v. Rispo,* 460 F. 2d 965 (3rd Cir. 1972) the Government had engaged in indicting dummy co-defendants to spy on defense trial strategy. Ironically, the court appointed counsel in that case was Arthur Kafrissen.

CONCLUSION

It is respectfully requested that this Honorable Court grant the petition for the writ of certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 79-1515
No. 79-1463

UNITED STATES OF AMERICA,

Appellee

v.

ROBERT SWINEHART,

Appellant in No. 79-1515

and

ROBERT PERRY,

Appellant in No. 79-1463

On Appeal From the United States District Court For the Eastern District of Pennsylvania

(D.C. Criminal No. 78-00217-01)

Argued December 11, 1979
Before: ADAMS, ROSENN, and SLOVITER,
Circuit Judges

(Opinion Filed January 17, 1980)

Appendix A

FRANCIS X. NOLAN, ESQUIRE
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ALFRED A. GOLLATZ (Argued)
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Counsel for Appellee

ROSENN, *Circuit Judge.*

The single question presented on this appeal is whether the Government's "sole discretion" to determine the defendants' cooperation under a plea bargaining agreement could be based exclusively on their failure of polygraph examinations. We conclude that the present record is unclear as to what extent the

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Government could, and did, rely on the polygraph tests and therefore vacate the judgment of the district court and remand.

I.

On June 28, 1976, Robert Swinehart and Robert Perry were indicted on 21 counts of embezzlement and bankruptcy fraud arising from their activities as part owners of Hourly Messengers, Inc. The planned trial was preceded by a two-week suppression hearing concerning whether the Government's proposed evidence was derived from sources independent of immunized testimony. The trial court denied the motions to suppress.

Plea negotiations followed, leading to substantially identical plea agreements for each defendant. They agreed to plead guilty to certain counts of the indictment in exchange for the dismissal of other counts. In the plea agreements, the Government agreed to seek a specific sentence for each defendant in the event it obtained his cooperation as determined by the Government in its "sole discretion." Among the obligations in the agreement, each defendant agreed to "take" a polygraph examination. If the defendants cooperated, the Government agreed that the appropriate sentence for Swinehart would be one year and six months and one year and one day for Perry. Both also would be placed on probation for five years and make restitution of $13,470. The crux of the agreements containing the various promises is:

> Defendant . . . has further offered and hereby agrees to fully cooperate with Government attorneys and investigators on all matters of interest to the Government. By the term "fully cooperate", defendant agrees that he will provide full and truthful responses to all questions asked and he will voluntarily disclose complete knowledge and information regarding all matters which are of interest to the Government. In

addition, he will provide truthful testimony pursuant to a subpoena in any proceeding including Grand Jury and whatever trials the Government deems his testimony desirable.

Under this agreement to fully cooperate with the Government, defendant agrees that he is obligating himself to provide truthful testimony and unreserved disclosure regarding any and all of the above matters of which he has knowledge and information. . . . Furthermore, defendant agrees to take any such polygraph examinations as the Government shall, from time to time, reasonably require. Any false statement made by defendant to any Grand Jury or at any court hearing or trial can and will be prosecuted under appropriate perjury statutes.

If defendant does fully cooperate with Government attorneys and investigators on all matters of interest to the Government, the Government will state to the Court at time of sentencing that it has obtained such cooperation. The Government has the sole discretion to determine whether or not the defendant's disclosures and testimony amount to full cooperation, within the terms of this agreement.

Both defendants entered guilty pleas before the trial court in accordance with the agreements. Sentencing was delayed to allow Perry and Swinehart to provide the tendered cooperation. Government agents proceeded to interview each of the defendants on several occasions and they answered questions dealing with matters of governmental interest.

In accordance with the agreement, Swinehart submitted to an FBI polygraph examination. The examination, administered by Special Agent Frank Cryan, showed that Swinehart failed several questions. Swinehart thereupon decided to take a private

polygraph test and consulted J.R. Pearce, a retired head of an FBI polygraph unit, who was one of Cryan's teachers. Swinehart passed the Pearce polygraph test.

Perry then took his polygraph examination with Cryan. Cryan concluded that Perry failed certain questions, all of which dealt with Swinehart's ability to pass his second polygraph examination. Perry then went to Pearce, who concluded that Perry passed some relevant questions and failed others.

The Government informed Perry and Swinehart that it deemed them not to have cooperated fully under the terms of the agreement. Both Perry and Swinehart filed motions to withdraw their guilty pleas or, alternatively, for specific enforcement of the plea agreements. The defendants argued that the agreements required them to "take" polygraph examinations, not "pass" them, and that the Government relied exclusively on the examination failures in concluding that the defendants had not fully cooperated within the terms of the plea agreements.[1] Perry and Swinehart both alleged that earlier drafts of the plea agreements had required them to "pass" the polygraph examination and that they specifically negotiated to only "take" the polygraph instead of "pass" it so that the Government could not rely solely on the test.

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1. On appeal Swinehart also argues that the district court relied on tapes between Swinehart and the attorney-part-owner of Hourly Messengers, Inc., in violation of the Sixth Amendment and attorney-client privilege. We reject this argument for several reasons. First, Swinehart never met his burden of proving an attorney-client relationship. In re Grand Jury Empanelled February 14, 1978: Nathan Markowitz, No. 79-1684 (3d Cir. July 23, 1979). Second, Swinehart never objected to the introduction of tapes on attorney-client grounds at the suppression hearing before trial. Third, this question was not previously raised in the district court and there was no evidence the court relied on the tapes at sentencing. Inasmuch as the material dealing with this attorney-client problem really is not implicated in this appeal, we see no reason for requiring the trial court and counsel, as the concurrence suggests, to further explore the matter.

The district court heard the defendants' allegation but did not take any evidence other than an affidavit by Perry, accepted as an offer of proof, concerning the change of the word "pass" to "take." Focusing only on the language of the plea agreements, the trial judge reasoned:

> I do not believe that the Government can be said to have abused its discretion where it relied upon the results of that polygraph in the absence of a finding of bad faith.
>
> Notwithstanding what may have been in the minds of defendants, the plea agreement is clear and unambiguous. The Government retains sole discretion — I emphasize the words "sole discretion" — to determine if there has been full cooperation. I must give those words their normal and generally understood meaning.

The court concluded that the Government had not acted in bad faith in exercising its "sole discretion" and denied the motions for withdrawal of the pleas or for specific enforcement of the agreements. Perry was sentenced to one and a half years and Swinehart three years in prison. Both defendants were also placed on probation for five years and were required to make restitution in the amount of $13,470. Both Perry and Swinehart appeal, claiming that the Government could not rely exclusively on the polygraph examinations in exercising its "sole discretion."

II.

The standard by which a trial court determines whether a plea may be withdrawn is "fairness and justice." *Paradiso v. United States,* 482 F.2d 409, 416 (3d Cir. 1973); *United States v. Stayton,* 408 F.2d 559, 561 (3d Cir. 1969). "The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for *any reason* the granting of the privilege seems *fair* and *just.*" *United States v. Stayton, supra,* 408 F.2d at 561, *quoting Kercheval v. United States,* 274 U.S. 220, 224 (1927).

Appendix A

The district court concluded that Perry and Swinehart should not be permitted to withdraw their guilty pleas because, *inter alia,* they had knowingly and voluntarily given the Government the "sole discretion" to determine whether they had cooperated. Perry and Swinehart argue on appeal that the Government improperly based its "sole discretion" exclusively on the polygraph examinations contrary to the intent of the parties, manifested in the change from the "pass" requirement to the promise to "take" the polygraph examination.[2] The district court did not make a finding whether such a change was in fact made. Assuming arguendo that it was, we conclude that the intent of the parties in substituting the word "take" for the word "pass" is unclear on the present record. We therefore vacate the judgment of the district court and remand for further findings.

In *United States v. Crusco,* 536 F.2d 21 (3rd Cir. 1976), the defendant alleged that he understood the term "sentence," as promised in a plea bargain, to include parole time as well as the time of confinement. The Government and the district court understood "sentence" to mean only the period of incarceration. In permitting withdrawal of the plea, this court stated that "[w]here the record shows that 'circumstances as they existed at the time of the guilty plea, *judged by objective standards,* reasonably justified his mistaken impression,' a defendant must be held to have entered his plea without full knowledge of the consequences and involuntarily." *Id.* at 24.

On the present record it is unclear whether (1) a change was made in the language of the plea agreement; and (2) if there were, whether Swinehart and Perry could have reasonably believed that the Government could not rely exclusively on the

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2. Perry and Swinehart also argue that reliance on the polygraph is impermissible, regardless of the plea agreement, because of the inadmissibility of lie detector evidence at trial and general unreliability of polygraph results. Although the infallibility of polygraphs is arguable, we decline to hold that the Government cannot rely on the tests where the parties agree to such reliance in a plea bargain.

failure of the polygraph examination. Under such circumstances, the district court should conduct a hearing to determine the validity of defendants' claims. The court should examine the circumstances surrounding the plea bargain and the alleged change in content, and determine the reasons why the defendants sought, and the Government agreed, to change the requirement of passing the polygraph examination.[3]

The Government argues that it is not limited in the factors it could consider, as long as it acts in good faith, because the agreement vests it with "sole discretion." We find some factual similarity in *United States v. Simmons,* 537 F.2d 1260, 1261 (4th Cir. 1976), where the court held that there are limits to the Government's discretion which need not be specified in the plea agreement. In *Simmons,* the plea bargain guaranteed "the defendants' full, complete and truthful cooperation" in exchange for a Government recommendation of a 15-year sentence. The Government concluded there was not full cooperation and did not recommend the 15-year terms. The court, in vacating the sentences and remanding for a hearing, stated "[t]here would be a manifest impropriety in permitting the government, without satisfying a judge that the evidence proves that a defendant broke his promise, to escape from the obligation the government undertook in the plea bargain." *Id.* at 1261-62. The court in this case distinguished *Simmons* on the ground that the plea agreements here specifically gave the Government "sole discretion."

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3. At oral argument, Perry's attorney asserted that it was commonly known among the defense bar that an agreement to "take" a polygraph examination does not require that one pass. He asserted that the reason for the examination is so the Government can evaluate the truthfulness of the information in the investigative process, not to determine if the defendant is cooperative. The Government argued that it was unaware of any accepted meaning to the terms "pass" and "take." The Government said each plea agreement has its own meaning. On remand, the district court may want to inquire whether there is any customary meaning among defense attorneys and the Government regarding these terms.

Appendix A

The use of the term "sole discretion" in a plea agreement ordinarily would give the prosecution a broad authority to ascertain whether the accused has cooperated. But when a defendant charges that the exercise of that discretion is improperly predicated upon a test to which the defendant has submitted, then the trial court, because it has judicially approved the bargain, has a duty to inquire whether the terms have been followed. The court, however, should not substitute its judgment for the judgment vested by the defendant in the Government under the plea agreement but, likewise, should not permit the Government to use its "sole discretion" to disregard its contractual commitments.

In determining whether the parties intended that the Government could rely exclusively on the polygraph examination, contract analogies may be helpful. *See, e.g., United States v. Roberts,* 570 F.2d 999, 1008 (D.C. Cir. 1977).

> The Government will not be allowed to avoid the obligation it . . . incurred by claiming now that the language literally promises nothing to the defendant. A plea agreement is not an appropriate context for the Government to resort to a rigidly literal approach in the construction of language.

United States v. Bowler, 585 F.2d 851, 854 (7th Cir. 1978). The trial court must consider the plea bargain in light of the important constitutional rights being waived by the defendant. *Jones v. Estelle,* 584 F.2d 687 (5th Cir. 1978).

Because of the unique nature of a plea bargain, involving as it does the waiver of constitutional rights, we believe the parol evidence rule should not be rigidly applied to bar evidence which would aid the trial court in properly construing the plea agreement. Thus, evidence of a prior draft plea agreement, or of statements made by the prosecution during the plea bargaining which sheds light on the meaning of a pertinent word or phrase in an "integrated" plea agreement would be admissible.

The Government also argues that it did not rely exclusively on the polygraph failures in determining that Perry and Swinehart had not cooperated. The district court did not confront this issue since it believed the Government had the right to rely exclusively on the polygraph tests. On remand, if the district court finds that the Government could not rely solely on the tests, it should consider whether the Government reached its decision on other relevant factors.

An examination of the evidence by the district court should reveal the intent of the parties. A hearing is especially appropriate in this case because the defendants' allegations pertain to purported occurrences outside the presence of the trial court. *Marchibroda v. United States,* 368 U.S. 487, 494 (1962); *United States v. Marzgliano,* 588 F.2d 395, 399 (3d Cir. 1978). The court is in the best position to ascertain the facts, assess the intent of the parties under the plea agreement and, if it was breached, to exercise its discretion and fashion an appropriate remedy. *United States v. Bowler, supra,* 585 F.2d at 856.

III.

It is indeed unfortunate that after a carefully considered plea bargain designed to avoid an evidentiary hearing concerning guilt, we are now required to remand for an evidentiary hearing as to the terms and meaning of the plea bargain agreement. However, important constitutional rights of the defendants are at stake and, in the interest of fairness and justice, the necessary inquiry must be made. The judgment of the district court will be vacated and the case remanded for further proceedings not inconsistent with this opinion.

SLOVITER, *Circuit Judge,* Concurring and Dissenting.

I concur in all parts of the majority opinion except footnote 1 dealing with the second issue raised by appellant Swinehart. He claims that the Government surreptitiously recorded conversations between him and his attorney, that those

conversations were used to induce the trial court to double the previously agreed upon sentence, and that the actions of the Government in this respect constituted such an egregious intrusion into the confidential relationship between him and his attorney that he is entitled to dismissal of all charges against him. The Government admits that Kafrissen, a shareholder of Hourly Messengers, Inc. who also served as its attorney, agreed to and did record conversations which he had with Swinehart, that transcripts of some of these conversations were marked as exhibits for use at trial, and that at the hearings on appellants' motions to withdraw their guilty pleas they were used for the purpose of showing inconsistencies between the facts as they were told to Kafrissen and as they were given to the Government polygrapher. The Government argues that Swinehart failed to prove an attorney-client relationship between him and Kafrissen, and that he waived any objection to the use of these taped conversations because he failed to invoke the claim of attorney-client privilege or violation of his rights under the Sixth Amendment at the time the transcripts were originally marked as exhibits. It admits that Swinehart did claim attorney-client privilege in objecting to the introduction of the transcripts at the hearings on appellants' motions to withdraw their guilty pleas. Swinehart argues that there was no need to object to the marking of the transcripts for the trial proceeding because the Assistant U.S. Attorney had represented that the transcripts would not be used as part of the Government's evidence in chief, and Swinehart attaches to his reply brief on appeal an affidavit to that effect by his trial counsel.

The record on these issues is not complete. It is not clear whether the relationship between Swinehart and Kafrissen was that of client and attorney, or whether, even if not, the statements of Swinehart were made under circumstances which would entitle him to a reasonable expectation that they were protected communications. The facts on possible waiver of his rights by Swinehart have not been developed. Since all members of the panel agree that this case should be remanded for hearing

on the issue of the plea agreement, I would also remand for determination of the nature of the relationship between Swinehart and Kafrissen. The burden is on Swinehart to prove the existence of an attorney-client relationship. *In re Grand Jury Empanelled February 14, 1978: Nathan Markowitz,* 603 F.2d 469, 474 (3d Cir. 1979). The relationship may have been that of two business colleagues concerned about possible investigation. *See, e.g. United States v. Stern,* 511 F.2d 1364 (2d Cir.), *cert. denied,* 423 U.S. 928 (1975). On the other hand, if the relationship between Swinehart and Kafrissen was a confidential one, then the court would have to determine whether its invasion by the Government was intentional or prejudicial, see *Weathford v. Bursey,* 429 U.S. 545 (1977), whether Swinehart preserved his rights, and if so, the appropriate sanction to be applied. See *O'Brien v. United States,* 386 U.S. 345 (1967) (per curiam); *Black v. United States,* 385 U.S. 26 (1966) (per curiam). These issues should be considered in the first instance by the trial court.

The allegations by Swinehart charge purposeful governmental intrusion into the privacy of the attorney-client communications. They may prove to be without foundation in fact. However, if proven, they would represent serious Government misconduct meriting effective judicial response. At a minimum, appellant Swinehart is entitled to a hearing at which there can be full-scale development of the facts. *O'Brien v. United States,* 386 U.S. at 346 (Harlan, J., dissenting); *Black v. United States,* 385 U.S. at 31 (Harlan, J., dissenting).

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 79-1463 and 79-1515

UNITED STATES OF AMERICA

vs.

PERRY, ROBERT F.,

Appellant in No. 79-1463

(D.C. Crim No. 78-00217-01)

UNITED STATES OF AMERICA

vs.

SWINEHART, ROBERT J.,
Robert Swinehart,

Appellant in No. 79-1515

(D.C. Crim. No. 78-00217-02)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, ROSENN and SLOVITER, *Circuit Judges*

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on December 11, 1979.

Appendix B

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 22, 1979, be, and the same are hereby vacated and the cause remanded for further proceedings not inconsistent with the opinion of this Court.

ATTEST:

S/
Clerk

January 17, 1980

APPENDIX C — PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 79-1515

UNITED STATES OF AMERICA

v.

SWINEHART, ROBERT J.,

ROBERT SWINEHART, Appellant

Present:

SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN HUNTER, WEIS, GARTH, HIGGINBOTHAM, and SLOVITER, *Circuit Judges*

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Max Rosenn
Judge

Dated: March 7, 1980

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED APRIL 7, 1980

No. 79-1515

UNITED STATES OF AMERICA

vs.

ROBERT J. SWINEHART,

Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until May 6, 1980.

s/ Max Rosenn
Circuit *Judge*

Dated: April 7, 1980

APPENDIX E — ORDER EXTENDING TIME OF THE SUPREME COURT OF THE UNITED STATES DATED APRIL 4, 1980

SUPREME COURT OF THE UNITED STATES

No. A-858

ROBERT J. SWINEHART,

Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 6, 1980.

s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 4
day of April, 1980.

APPENDIX F — EXCERPTS OF MOTION TO SUPPRESS DATED OCTOBER 4, 1978

[Commencing at page 7-24]

CROSS EXAMINATION OF A. KAFRISSEN:

* * *

not to volunteer information to you that he testified about before the bankruptcy court? A. No.

Q. Prior to going to these three meetings, were you advised by the FBI not to ask questions or solicit information which could have been derived or stated by Mr. Swindhart [sic] before the bankruptcy court? A. No.

Q. During your conversations with the FBI, did they ever give you any indication that they were aware of some of the topics that were discussed before the bankruptcy court? A. No.

Q. Sir, before you engaged in these conversations with Mr. Swinehart, were you advised to cover certain topics? A. Yes.

Q. Am I correct, sir, in that at least one of the conversations and I believe it was in July of 1976, that there was quite an extensive discussion of the pension funds? Do you recall that? A. Which conversation was that? Perhaps it would help me to know that.

Q. Any of the three conversations. A. There probably was.

* * *

[7-44] cooperative. I don't understand what you are after.

Q. Did you agree to assist the Government to obtain evidence against other persons? A. No, but I agreed to answer

whatever questions were asked of me and to cooperate in whatever investigation there was.

Q. Did the Government not make any threat to you in order to get you to wear a body recorder? A. No.

Q. You were not threatened with prosecution? A. No.

Q. No inducement was made to you? A. It is very difficult to say — I don't understand exactly what you mean by "inducement."

Q. Did you wear the body recorder? A. I knew there was an ongoing investigation of Hourly Messengers. I had been contacted by the Government. There was never a grant of immunity or anything like that. They simply said that if I cooperated and what I said was relevant, I would be treated accordingly — not relevant, what I said was truthful, I would be treated accordingly and I did and they never threatened to prosecute or promised not to prosecute.

Q. One of the later body recorders that you [7-45] wore was an interview with your own former client, Mr. Swinehart; wasn't it? A. Yes.

Q. Did your decision to wear a body recorder, was that at all influenced by the fact that these men had told you that if what they had done and they admitted to in the bankruptcy court was illegal, that they would plead guilty? A. No.

Q. Did that play any part in your decisions? A. No.

MR. CARROLL: I have nothing further.

THE COURT: Mr. Murphy?

MR. MURPHY: I have no questions.

Appendix F

THE COURT: Anything else?

MR. BATTY: Yes, Judge, I have just a couple of questions.

THE COURT: All right

REDIRECT EXAMINATION

BY MR. BATTY:

Q. In response to a question by Mr. Kidd about, are there other statements or conversations that you had with the FBI beyond the 302's, did you understand him to mean are there other occasions on which you talked to the FBI other than those reflected in the

* * *

[7-25]

Q. Am I correct in assuming that that topic was suggested to you to be covered in that meeting by the FBI? A. Yes.

Q. And, did they more specifically tell you to cover the sale of the stock and the cashing in the savings certificates and issues such as that? A. I don't recall how specific they were.

Q. But it was clearly your understanding to explore that topic — A. Yes.

Q. — during those conversations? A. Yes.

Q. It is also clear that no one told you not to solicit any information which may have been volunteered or given to the bankruptcy court? A. Yes.

Q. During any of the times that you were dealing with the FBI, did they alert you to a potential problem concerning the

immunity that Mr. Swinehart and Mr. Perry had with regard to their testimony before the bankruptcy court? A. Yes.

Q. They did? A. Yes.

APPENDIX G — EXCERPTS OF TRANSCRIPT OF CONVERSATIONS DATED OCTOBER 27, 1976

* * *

demonstrable proof that the attorney client relationship existed, and that when the Government introduced the tapes into evidence, that the Government had established the attorney client relationship and it was not necessary for the defendant to put on additional proof of that fact. In support of this statement, defendant Swinehart quotes from various pages of the surreptitiously recorded conversations:

Page

9 Conversation of 10/27/76 (establishing confidentiality):

Kafrissen to Swinehart: "Well I have been kind of curious to know what the hell it was about because you could not talk on the phone."

In the following quotations, Swinehart is discussing with Kafrissen a proposed business venture and is specifically asking legal advice as to whether or not the proposed business venture would be violative of any Federal or State law and whether or not certain forms would be in compliance with the law:

Page

23 Conversation of 10/27/76:

Swinehart to Kafrissen: "I just want to be assured of three things, that it is not in violation of any Federal Law, mail fraud, mail fraud especially because everything's through the mail or any State laws."

24 Conversation of 10/27/76:

Appendix G

Swinehart to Kafrissen: "I can bring in the money, no problem, I can set up offices, but I want to be sure I am legal before I do it."

26 Conversation of 10/27/76:

Kafrissen to Swinehart: "Yea, well I agree with this part of the legal," . . . "Forget morals, no, it's legal,"

28 Conversation of 10/27/76:

Kafrissen to Swinehart: "That, you know I said okay that's legal. Granted, This is legal, and granted this lease will work."

36 Conversation of 10/27/76:

Swinehart to Kafrissen: "I don't want to be a shakedown. I want to be able to legitimately earn those fees", (and at the bottom of said page): "I don't want to go to jail for mail fraud, I don't want any mail fraud, I don't want it to be illegal as long as I can (unintelligible) and have a good as long as I am legal it's a hell of a business."

37 Continuing:

"But I want to be legal. I will not do it (unintelligible) I'll go to work when he closes up and I will be in the same boat I was in years ago. (The middle of page 37): *Swinehart to Kafrissen:* "I don't think its clear enough for somebody to write it on their own. I said the hell with it, let me write it, tell me is it legal?"

59 Conversation of 10/27/76:

Kafrissen to Swinehart: "Well I'd like to look it over . . . to read the whole thing."

Appendix G

67 *Swinehart to Kafrissen:* "I don't mind aggravation as long as I know I'm right."

Kafrissen to Swinehart: "I understand that."

Swinehart to Kafrissen: "You're saying just as long as its legal, it's you know, big deal."

71 *Swinehart to Kafrissen:* "I'm going to form a corporation. What are you going to charge me . . . I'll start sending you money on the corporation, okay."

77 *Swinehart to Kafrissen;* "If it's illegal, you're doing something wrong."

Kafrissen to Swinehart: "You're not doing anything illegal."

82 *Kafrissen to Swinehart:* "Well I would say that you know in my opinion . . . I haven't read the lease, . . . What you are saying seems to make sense-it would seem to be legal."

102 Conversation of 10/27/76:
Kafrissen to Swinehart: "I'll go over this thing tomorrow . . . and let me check the laws, see what the Federal and State laws are and then I'll give you an answer . . . I mean I'll give you an answer as to the legality of the whole deal."

APPENDIX H — AFFIDAVIT OF RONALD F. KIDD DATED OCTOBER 24, 1979

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

ROBERT F. PERRY
ROBERT F. SWINEHART,

Appellants

NO. 79-1515

COMMONWEALTH OF PENNSYLVANIA:
SS
COUNTY OF PHILADELPHIA :

I, Ronald F. Kidd, Esq., being duly sworn according to law, depose and say that I am a member of the bar of the Supreme Court of Pennsylvania, and was trial counsel in the above case, and that trial counsel for the government was Alfred A. Gollatz, Esq.

At or about the time of a pre-trial suppression hearing, Mr. Gollatz advised me that the government did not intend to use the transcripts of taped conversations between defendant Swinehart and Arthur Kafrissen as part of their evidence-in-chief.

s/ Ronald F. Kidd
Ronald F. Kidd

Appendix H

Sworn to and subscribed
before me this 24 day
of October, 1979

s/ Virginia K. Kotbinski
Notary Public

Virginia K. Kotbinski, notary public
Philadelphia Phildelphia County
My Commission Expires Jan. 23, 1982
Member, Pennsylvania Association of Notaries

APPENDIX I — EXCERPTS OF TRANSCRIPT OF SENTENCING DATED MARCH 19, 1979

DIRECT EXAMINATION OF W. HEILMAN

[Commencing at page 217]

* * *

we completed our interviews, under the plea bargain agreement, I later went back and reviewed the transcript, what was contained in the transcript, and compared it to what he had told me earlier.

Q. Was there anything in the transcripts — in any of the transcripts — which might be at odds with what he told you during the course of your interviews with him? A. There were several points.

Q. Well, with respect to capitalization? A. Well, I do recall on the 10/27/76 transcript —

Q. Which is Exhibit 15? A. Yes.

MR. KIDD: I am going to object to all testimony regarding Government Exhibits 15 and 16. For purposes of the Court's information, I believe these are two transcripts of consentual monitoring between Mr. Swinehart and Mr. Kafrissen and at that time, Mr. Kafrissen was Mr. Swinehart's lawyer. So that there is a serious question as to the attorney-client privilege. At that time, he was currently representing him and had represented him in the past.

THE COURT: Mr. Gollatz?

[218] MR. GOLLATZ: I think if your Honor reads the transcript, I don't think the attorney-client privilege applies to these particular transcripts, number one, because it would be the Government's position that these documents are — the advice

was being sought for the purposes of perpetrating a fraud. I don't think we need get that far.

The question is whether the Government acted in good faith in this regard.

Agent Heilman testified that he has looked at the transcript and he has acted upon that advice. The question is not evidentiary, whether we are admitting the truth — admitting these transcripts as such, the conversations. All it is is to show the Court that we do have inconsistent statements. So therefore, we have a basis for saying they have not cooperated.

So, therefore, I don't believe the privilege applies. The Government could, for example, even have, relied on things which were covered by the Fifth Amendment privilege in this regard.

THE COURT: Just a moment, gentlemen.

What you are saying, Mr. Gollatz, is

* * *

[220] quote:

"Unintelligable part of the tape."

"— he got from the loan sharks, yeah."

Q. Who was speaking at that time? A. That was Mr. Swinehart speaking to Mr. Kafrissen and they were talking about how Mr. Swinehart got started in the business, AID Leasing.

Q. Did you discuss with Swinehart during the course of your interviews with him whether or not Mr. Schwartz had

intended to file for bankruptcy for AID Leasing? A. Yes, I asked him whether bankruptcy was the ultimate goal of the company and he indicated that he did not have any knowledge of that. He believed it is possible, but did not know for sure.

Q. Did your review — by the way, what particular 302 are you relating there? A. Just a minute.

Q. I have in my notes it is the 11/8/78, which is Government Exhibit 8. A. I will check my notes.

Q. Page 4. A. I have that also, 11/8/78, 302. Mr. Swinehart

* * *

[222] a conversation between Mr. Schwartz and Mr. Swinehart where Mr. Schartz told Mr. Swinehart he was taking money out of AID on a weekly basis to pay off a past problem at AID.

Q. Before you, do you have any Government exhibits relating to that interview with Delmartin? A. No, I believe I previously furnished them to you.

Q. In the original page of exhibits that I have before you, would you look at Government Exhibit 13? A. Yes, I have it.

Q. And is that your 302 of an interview with Delmartin? A. Yes, that is correct.

Q. On page 7, is that the reference that you are making? A. Yes.

Q. During your interviews with Mr. Swinehart, did he ever discuss with you when he first learned or first believed that AID Leasing was a fraudulent leasing company? A. He indicated he had been there six months before he realized Mr. Schartz was operating a fraudulent company.

Appendix I

Q. Was that consistent or inconsistent with any [223] other statements or facts you discovered during your investigation? A. I believe it is.

Q. Is what — inconsistent? A. I believe it is inconsistent with information that appeared on this 11/27/78 — excuse me — the 11/8/76 transcript.

Q. Which is Government Exhibit 16? A. Yes.

Q. Could you cite a particular reference to the Court? A. Mr. Schwartz is explaining here — Mr. Swinehart, they are talking about what will eventually happen to AID and he explains —

Q. When you refer to the transcript would you try to give a page citation? A. Page 86 of the 11/8/76 transcript. Mr. Swinehart is talking about what will evenutally happen at AID and he says:

> "That is right. He did it at Wayne Equity, he did it at FID Leasing. Both of these companies, one filed bankruptcy and one just closed its doors and the principals disappeared."

Also, page 138 of that same transcript. [224] he is talking about Mr. Schwartz' background to Mr. Kafrissen. He indicates:

> "He was in the black market during the war —"

Q. "He" being Mr. Schwartz? A. "He" being Mr. Schwartz.

> "He has always been a wheeler-dealer kind of promoter, but he always has that knack of being in trouble."

Appendix I

Also, on page 86 of that same transcript, Mr. Swinehart says:

> "If you could only spend a week in that office."

Q. Now, during the course of your investigation of AID Leasing, did you investigate who approved the deals or was responsible for approving the leasing arrangements? A. Yes, I was trying to fix responsibility in the operation, who was in charge, who actually would approve the deals.

Q. Did you discuss that with Mr. Swinehart? A. Yes, I did.

Q. What did he tell you? A. He indicated Mr. Schwartz approved all the deals and he personally handled and approved all the

* * *

[226] not consider himself an officer in the company.

Q. Now— A. Also, the district attorney's communication to me indicates from the district attorney's office that Scheiber was considered the vice president of sales. On the 10/27/78 — excuse me — the 11/27/78 —

Q. 1976? I think you are confusing it. A. I may be slightly confused myself.

Q. Mr. Swinehart told you that Scheiber did not consider himself to be an officer of the company; is that correct? A. Yes.

Q. And, what information do you have that is inconsistent or in opposition to that? A. We have on page 132 of the

11/8/76 transcript, we had Mr. Swinehart saying to Mr. Kafrissen:

"Scheiber is an officer of the company."

Also, as I mentioned before, the district attorney's communication where he indicates to the district attorney that he was considered vice president of sales.

Q. That is Exhibit 14? A. Yes.

Q. Now, did your inquiries of Mr. Swinehart during

* * *

[228] Q. Did you review the transcripts regarding Mr. Sindone's relationship to Mr. Schwartz and possibly the funding of AID Leasing through Mr. Sindone? Was there any reference in the transcript to that effect? A. About funding between Mr. Sindone and Mr. Schwartz?

Q. Or any relationship between Mr. Schwartz and Mr. Sindone and Mr. Swinehart? A. Well, as it was mentioned earlier before, I had trouble locating the reference on the 10/27/76 transcript. They were talking about how Mr. Schwartz got capitalized and Mr. Schwartz said he got it from the loan sharks. That refers to the possible capitalization of AID Leasing on Mr. Schwartz' behalf. There are several references, I guess, between Mr. — where Mr. Swinehart explains his dealings with Mr. Sindone.

Q. Is there any reference as to how Mr. Swinehart met Mr. Schwartz? A. Well, I think he indicates on the tape that Mr. Schwartz and Mr. Sindone met during a loan sharking trial back in approximately 1971. At that time Mr. Sindone introduced Mr. Swinehart and Mr. Schwartz.

Appendix I

Q. During that transcript, is there any reference to how Mr. Swinehart was going to get the funding to start ARCO Leasing? [229] A. I believe there was some indication there. He talks about on page 111 from the 11/8/76 transcript —

Q. Which is Exhibit 16? A. That is correct.

Mr. Swinehart is talking about borrowing money to start up ARCO Leasing and he indicates:

> "Oh, I will get the five grand back — (unintelligible) — downtown. Don't get killed if that's what you are planning — no, I won't get killed."

Q. Have you made a determination in your own mind as to whether or not Mr. Swinehart has given you all the information about all of his dealings with Mr. Sindone? A. I don't believe he has given me all the information.

Q. During the course of your investigation, did you ever try to determine how Mr. Swinehart might have come to meet Mr. Sindone? A. I believe we asked him after he told us about the initial borrowing incident, we asked him who referred him, and he advised us that he did not remember who led him to the first contact with Mr. Sindone.

Q. During the course of the polygraph reviews and I believe those are of Mr. Swinehart's commercial [230] polygrapher. Did he state who referred him to Mr. Sindone? A. I believe that he must have told his attorney or the commercial polygrapher it was Mr. Jojo Scotti.

Q. Who is Mr. Scotti? A. I believe he is a salesman at Wolfington Chevolet.

A. Is Mr. Scotti Alive? A. No, he is deceased.

Q. Now — A. According to Mr. Swinehart. I am not in a position to verify that now.

Q. During the course of your review of the transcripts, did Mr. Swinehart say anything that was inconsistent with lack of knowledge and with the fact that it was Mr. Scotti who introduced him? A. On page 11 of the 10/27/76 transcript, Mr. Swinehart is talking about his dealings with Mr. Sindone and he indicates:

> "Hey, Eddie — (unintelligible) — who got me started — (unintelligible)."

I believe he is talking about the individual who got him in touch with Frank Sindone.

Q. That was Government Exhibit 15 that you are talking about? [231] A. Yes.

THE COURT: What page?

THE WITNESS: Page 11.

THE COURT: Thank you.

Q. Now, during the course of your interviews with Mr. Swinehart, did you discuss what I will call a "TV caper" in any way? A. Yes, we did.

Q. Could you describe for the Court, basically, what that was? A. Well, Mr. Swinehart indicated that as a result of his initial contact with Mr. Schwartz through the introduction of Mr. Sindone, he and Mr. Schwartz became associated and sometime later, agreed to participate in a scheme whereby Mr. Schwartz could generate money that he needed to pay off Mr. Sindone and this particular method was involving the fraudulent obtaining of television sets from various manufacturers around

town, having them delivered to a non-existent address and then selling those particular television sets and obtaining the capital for Mr. Schwartz.

Mr. Swinehart had also received a portion of the television sets for himself.

Q. Now, when Mr. Swinehart discussed that with the FBI, did he mention Mr. Sindone's role in that [232] activity? A. No, he did not.

Q. Now, are there any —

MR. GOLLATZ: Strike that.

Q. Are there facts or statements in your investigation which indicate that Mr. Sindone might have had a more active role? A. On page 12 of the 10/27/76 transcript, he indicates:

> "Sindone introduced us and said 'Bob, we can set this deal up.' Sindone promoted it."

Q. And the reference is to that TV transcript? A. Yes.

Q. All right. A. Another thing Mr. Swinehart did not mention was there was a Mr. Dortona involved in that particular transaction.

Q. Now, during the course of your interviews with Mr. Swinehart, did you remind him that he was to give unreserved disclosures about these matters? A. I believe that was the understanding or the agreement that he was going to provide information, his complete knowledge of any criminal activities.

Q. Now, during the course of your investigation,

* * *

Appendix 1

CROSS EXAMINATION OF W. HEILMAN

* * *

[254] was doing. I think the approvals were granted by whoever happened to be present in the office at the particular time. I am not sure that any one person did approve the deals. Mr. Schwartz was definitely in charge of the AID office. However, Mr. Swinehart, I believe, wants us to believe that he in no way had any part in approving the deals. Yet, during the transcripts and he reviewed them, Mr. Swinehart will tell Mr. Kafrissen, Schwartz does not approve the deals, we do everything. That's not a direct quote.

I believe he also goes on to explain later on — Mr. Kafrissen says, "Aren't you worried about being criminally involved in this?" He says, "No, If I am ever questioned, I am a salesman. I am a salesman. I have no contact. All I do is tell them that I did what somebody else directed me to do." That's all in the transcript.

Q. So we are back to the transcript with respect to the inconsistent statements Mr. Swinehart furnished to you when he came in to give evidence? A. Yes.

Q. Do you have any other evidence? A. I believe I might find some customer interviews where Mr. Swinehart told the customer he was approved.

Q. Isn't it possible he could tell the customer

* * *

[259] orders."

THE COURT: Mr. Gollatz, how, if you recall, precisely, did you use Exhibit 14 on direct examination?

MR. GOLLATZ: Exhibit 14 was primarily, to my recollection, your Honor, used with respect to what Scheiber's activities in the firm were and if your Honor recalls that Scheiber is primarily an employee of ARCO, Mr. Swinehart's company. That is one way it was used and it was also used in the sense to show that Swinehart told us that Schwartz personally looked at and approved all deals and Mr. Kidd is correct, there was some — we did try to show that Schwartz or Scheiber approved the deals as well, but then that was inconsistent with what he said on the transcript, namely, that Schwartz does not do anything we do.

THE COURT: Objection overruled.

Would you answer the question?

Do you wish to rephrase it, Mr. Kidd?

MR. KIDD: I will go about it in another way.

Q. Sir, isn't one of the imporant functions of

* * *

[266] time? A. No, he didn't indicate any problems with repayment.

Q. Twenty weeks at $600 and how many weeks with regard to the $5,000 would there have been? A. I believe the loan must have occurred in 1969. In any case it was on Mifflin Street, where the company was located on Mifflin Street, and in 1969 the company was located on Mifflin Street, so we are talking about a loan in late 1969.

Q. What was the amount of the loan discussed in the intercepted communication in the latter part of 1970? A. You can't identify the amount. You can only infer that he was repaying a previous loan, possibly several — probably several.

Q. Could it have been two, like $10,000 and $5,000? A. I cannot tell.

Q. So in effect, it is not inconsistent, that intercepted communication, with what Mr. Swinehart told you? A. I would say in reviewing the contents of the previous transcript that we referred to —

Q. Are you talking about the surreptitious recordings and the conversations with the — with his attorney? [267] A. If we look at the 10/27/76 transcript, I think he appears to be talking — there is two separate borrowing incidents, one is when he originally started the company. Then he describes another one later on when he was over on Marlton Pike and he describes a separate incident.

Q. It could have been the $5,000 borrowing? A. Not according to the amounts in the transcript.

Q. You are talking about the transcript with Mr. Kafrissen? A. Yes.

Q. Now, sir, based on what you have been able to determine from your own investigation and your review of other FBI files, what is it that Mr. Swinehart borrowed from Mr. Sindone? A. I am not able to determine. It appears that there are several.

Q. You are aware, sir, that Mr. Swinehart has immunity with regard to all these statements; am I correct?

MR. GOLLATZ: Objection. I don't believe that that is necessarily the case. I think Mr. Kidd ought to reread that agreement. Mr. Swinehart has an immunity which depends in part upon his cooperation.

* * *

[271] Government?

MR. GOLLATZ: None, your Honor.

THE COURT: Anything else for the record, gentlemen?

MR. KIDD: Your Honor, can we have one minute to consult?

THE COURT: Would a short recess be appropriate?

MR. KIDD: It may be.

THE COURT: Let me ask you this. If the record is closed, I assume we can then have argument. I would like to precisely understand the Government's position and I am trying to determine the standards and criteria to decide the issues before me, so that I will seek oral argument on that. Is there a possibility we are almost at that point?

MR. KIDD: Yes, your Honor.

MR. GOLLATZ: The only thing, when you say the record is closed, I assume that means all the documents we have we would intend to offer in evidence, 1 through 15?

MR. KIDD: I assume that is what is meant. Does that also include the polygraph report of Mr. Swinehart of the independent

* * *

[286] relate those to the questions that Mr. Heilman testified about this morning. For example, on the polygraph examination, the second question is:

> "Do you know for sure how AID was originally capitalized?"

His answer is:

"No."

Now, Heilman's testimony and a review of the other transcripts indicates that Mr. Swinehart may have more knowledge than what he says he does. For example, his transcript shows that it was from loan sharks that Mr. Schwartz got the capitalization. But then when he talks to the FBI, he does not talk about loan sharks.

In his conversation with Mr. Kafrissen he talks about loan sharks. When he talks to the FBI, he does not talk about loan sharks, he talks about a hocked ring or something else, not anything that relates to loan sharking activities.

There was a question:

"Do you know for sure who referred you to Sindone?"

* * *

[289] THE COURT: Well, what for example in the last one caused the Government to believe that that was not full cooperation, the $20,000 Frank Sindone statement?

MR. GOLLATZ: Well, your Honor, what we believe and I believe the testimony of Agent Heilman has shown, is that Mr. Swinehart has a more extensive relationship with Mr. Sindone than he would subscribe to. When he first came in, he talked about a $10,000 loan. Then, it went to a $10,000 plus $5,000, another additional amount. Then, there are statements throughout the whole transcript which indicate a relationship to Mr. Sindone that the defendant would perhaps have more information about that area.

Now, we are talking about two things. We are talking about deception on the polygraph, plus, coupled with other information which tends to corroborate that the defendant may be deliberately lying or he may be withholding information. In the terms of his agreement, he is to provide full cooperation, by, among other things, voluntary disclosure and unreserved disclosure and that is what we [290] are talking about here.

THE COURT: All right.

MR. GOLLATZ: Like I said, there are other areas, but one of the things I think is important — that should be important for the Court to understand is that then there was conversations today or testimony today about Mr. Scheiber, as Agent Heilman testified that Mr. Scheiber is now employed by Mr. Swinehart at ARCO Leasing.

Mr. Swinehart's original statements to people who would be an uninterested witness, like Mr. Kafrissen, and then interested witnesses like the Philadelphia district attorney's office indicated that Mr. Scheiver paid a more priminant [sic] role in AID Leasing than he would have the FBI believe and that was the purpose of that testimony. So now we are getting motivations not only of pure deception regarding — not only are we getting into an area where the polygraph is corroborated by these particular questions and the particular testimony of Mr. Heilman, but we are also getting into an area which shows the defendant has a motivation for exculpating somebody other

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No. 79-1770

In the Supreme Court of the United States

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ROBERT J. SWINEHART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the government violated petitioner's rights through the consensual recording or subsequent use of certain conversations that petitioner had, prior to the return of this indictment, with a business associate who was also an attorney.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 614 F.2d 853.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a-14a) was entered on January 17, 1980, and a petition for rehearing was denied (Pet. App. 15a) on March 7, 1980. On April 4, 1980, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including May 6, 1980 (Pet. App. 17a), and the petition was filed on May 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner and co-defendant Robert Perry were indicted on June 29, 1978, in the United States District Court for the Eastern District of Pennsylvania on 21 counts of embezzlement from an employee benefit fund (18 U.S.C. 664) and bankruptcy fraud (18 U.S.C. 152), arising out of the bankruptcy of Hourly Messengers, a Philadelphia delivery service, of which petitioner and Perry were majority shareholders and principal officers. The bankruptcy petition was filed in 1974. In 1976, while petitioner's fraudulent activities were ongoing, the government secured the cooperation of attorney Arthur Kafrissen, another shareholder in Hourly Messengers, who agreed to record his conversations with petitioner. The government provided

petitioner with the recorded conversations after his indictment in June 1978.

In October 1978 a two-week suppression hearing was held on petitioner's and Perry's claims that the government had improperly derived evidence from immunized testimony that they had given at a creditors' meeting. Transcripts of the taped conversations between petitioner and Kafrissen were marked as exhibits at the suppression hearing, and petitioner did not contend at that time that the government had violated his attorney-client privilege or Sixth Amendment rights.

The trial court denied the suppression motions. Plea negotiations followed and, on October 16, 1978, both defendants entered into substantially identical plea agreements. Petitioner pleaded guilty to five counts of the indictment, and the government agreed that an appropriate sentence would be 18 months' imprisonment, five years' probation, and restitution (Pet. App. 3a). The plea agreement provided that petitioner would "fully cooperate" with the government by giving truthful testimony and "unreserved disclosure," and further required that he "take" any polygraph examinations that the government might request (Pet. App. 3a–4a). Moreover, the agreement gave the government "sole discretion" to determine whether petitioner's cooperation had been sufficient (Pet. App. 4a).

When petitioner failed a polygraph examination prior to sentencing, the government concluded that he was not cooperating as required by the agreement,

and it refused to recommend the sentence that had been agreed upon (Pet. App. [redacted] 4a–5a).

Petitioner then moved to withdraw his guilty plea or, alternatively, for specific enforcement of the agreement. The district court heard evidence and concluded that the government had not abused its discretion in refusing to recommend the 18-month sentence (Pet. App. [redacted] 5a–6a).[1] The government's evidence showed how the polygraph had been interpreted and why the government concluded that petitioner had provided inconsistent information. That conclusion was based upon the polygraph results, upon information supplied by the Philadelphia District Attorney, and partly upon two recorded conversations between petitioner and Kafrissen (Pet. App. 5a n.1).[2] The district court denied petitioner's motion, sentenced him to three years' imprisonment and five years' probation, and imposed a requirement of restitution (Pet. App. 6a).

In the decision that is challenged here, the court of appeals vacated and remanded, holding that a further hearing was necessary to determine the validity of petitioner's contention that the plea agreement re-

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[1] Co-defendant Robert Perry had entered into a plea agreement that was virtually identical, except that his recommended term of imprisonment was to be only one year and one day (Pet. App. 3a). The court found that Perry had also breached the agreement, and he was sentenced to 18 months' imprisonment (Pet. App. 6a).

[2] The district court admitted the conversations, not for the truth of the matters asserted therein, but for the limited purpose of demonstrating inconsistencies in the information that petitioner had provided under the agreement (see Sentencing Transcript ("S. Tr.") 218–219).

quired him only to "take"—rather than "pass"—a polygraph examination. Petitioner also argued that his attorney-client privilege or Sixth Amendment rights had somehow been violated, but the court of appeals rejected that contention, noting that petitioner had failed to establish the existence of an attorney-client relationship with Kafrissen, that petitioner had not preserved his objection at the suppression hearing and that the trial court had not relied on the tapes in imposing sentence in any event (Pet. App. 5a n.1). Judge Sloviter dissented on the ground that the attorney-client privilege claim should also be remanded for further fact-finding (Pet. App. [redacted] 10a–12a).

ARGUMENT

1. We note at the outset that petitioner's conviction and sentence have been vacated by the court of appeals and the case has been remanded for further findings on the issue of petitioner's compliance with the plea agreement. It is possible that petitioner will succeed in showing that the agreement required him only to submit to—rather than pass—a polygraph examination, in which case petitioner may be entitled either to plead anew or to obtain specific performance of the agreement. In any event, petitioner's present claim is interlocutory and need not be reviewed at this stage of the proceedings.

2. On the merits, petitioner's contentions are unfounded. The recording of petitioner's conversations with Kafrissen, which occurred with the latter's consent, did not violate petitioner's rights under the Fourth, Fifth or Sixth Amendments. Petitioner volun-

tarily chose to engage in conversations with Kafrissen, whose consent precluded any claim that petitioner's Fourth or Fifth Amendment rights were violated. See *Hoffa* v. *United States*, 385 U.S. 293 (1966); *Lopez* v. *United States*, 373 U.S. 427 (1963). Petitioner's Sixth Amendment claim would also lack merit, even if he had been consulting Kafrissen as an attorney, because the recordings were made almost two years before the return of this indictment, well before any "critical stage" of this prosecution (S. Tr. 215–216; Court of Appeals Supplemental Appendix ("App.") 114–A). See *Powell* v. *Alabama*, 287 U.S. 45 (1932).[3]

3. Petitioner apparently contends that the government's limited use of the recordings to demonstrate its basis for abandoning the plea agreement violated either his attorney-client privilege or some other unspecified rights related thereto. That argument lacks merit for several reasons. First, there was no violation of any valid attorney-client privilege. The district court apparently held that the privilege was waived under the fraud exception (S. Tr. 218–219), while the court of appeals held that petitioner had not carried his burden of proving that Kafrissen was his lawyer (Pet. App. 5a n.1). Since there was no valid attorney-client

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[3] Petitioner contends generally (Pet. 9) that the government's misconduct tainted the prosecution from the outset and "cannot result in a constitutionally valid conviction." While it is difficult to respond to petitioner's generalizations, petitioner apparently conceives of Kafrissen's cooperation as government misconduct that somehow violated the Sixth Amendment by violating petitioner's attorney-client privilege. Both courts below have held that no valid attorney-client privilege was involved here. The district court apparently held that the attorney-client privilege had been waived because of petitioner's on-going fraud

privilege in either event, neither the creation nor any subsequent use of the tapes was improper. Second, petitioner's objection to the tapes was untimely. Petitioner was provided with the tapes before he entered his guilty plea, and he was thus well aware of

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(S. Tr. 218–219), while the court of appeals found that petitioner had not even established that Kafrissen was his attorney (Pet. App. 5a n.1).

The court of appeals properly held that petitioner had not carried the burden of proving an attorney-client relationship. See *In re Grand Jury Empanelled February 14, 1978*, 603 F.2d 469, 474 (3d Cir. 1979); *United States* v. *Landof*, 591 F.2d 36, 38 (9th Cir. 1978); *United States* v. *Stern*, 511 F.2d 1364, 1367 (2d Cir.), cert. denied, 423 U.S. 829 (1975). At sentencing, petitioner's counsel baldly asserted that Kafrissen was petitioner's attorney at the time of the consensual overhearings (S. Tr. 217, 335). Petitioner makes the same generalized assertion here (see Pet. 3), but the record flatly contradicts it. Kafrissen testified that he was himself represented by counsel during the relevant period, and the only reference to petitioner was as a "former" client (Suppression Hearing Transcript (7th day) ("H. Tr.") 7–39 to 7–42, 7–44 to 7–45). Petitioner did not challenge that characterization. The only evidence that even tends to support petitioner's contention consists of a few isolated references to legal matters that petitioner has distilled from the voluminous transcript of the overhearings (see Pet. App. 22a–24a). Those references are not persuasive. Given a continuing business relationship, particularly a relationship in which one of the principals is a lawyer and the business is engaged in illegality, it is inevitable that business discussions will occasionally involve matters that have legal significance. Such isolated references are insufficient, however, to establish the existence of an attorney-client relationship. See 8 Wigmore, *Evidence* § 2292 (McNaughton rev. ed. 1961). Moreover, the record clearly establishes an on-going fraud that would defeat the attorney-client privilege in any event. *Clark* v. *United States*, 289 U.S. 1 (1933); *United States* v. *Aldridge*, 484 F.2d 655 (7th Cir. 1973), cert. denied, 415 U.S. 921 (1974). There is thus no basis for asserting that the government acted improperly in obtaining Kafrissen's cooperation in its investigation of petitioner.

whatever claim he might have had. He had a two-week suppression hearing on his claim that the government's evidence was derived from immunized testimony. If petitioner believed that the tapes had been created in violation of his rights under the Sixth Amendment or the attorney-client privilege, or that their use would violate those rights, he should have moved to suppress or for other appropriate relief at that time. See Fed. R. Crim. P. 12. Instead, he chose to enter a plea with full knowledge of the underlying facts.[4]

4. Petitioner also complains that his rights were denied by the court's use of the tapes at sentencing. That contention has no merit because the record contains no evidence to suggest that the district court considered the recordings in determining the sentence to be imposed. The district judge specifically stated that he was "starting from scratch" in determining an appropriate sentence, without any reliance on the plea agreement, and that he was well familiar with the nature of petitioner's criminal conduct and the harm that

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[4]Petitioner attempts to explain his inaction by stating that the government had "advised defense trial counsel that it would not use the transcripts" (Pet. 3). The affidavit of petitioner's trial counsel, however, states only that he was advised "that the government did not intend to use the transcripts of taped conversations between [petitioner] and Arthur Kafrissen *as part of their evidence-in-chief*" (Pet. App. 25a; emphasis added). If there had been any merit to petitioner's contention that the recordings violated a genuine attorney-client relationship, it is inconceivable that he would have failed to pursue his claim simply because of that representation. Moreover, if the conversations had been privileged, petitioner's failure to protect the privilege would have resulted in a waiver long ago. See *Velsicol Chemical Corp.* v. *Parsons*, 561 F.2d 671 (7th Cir. 1977), cert. denied, 435 U.S. 942 (1978).

had been done (App. 96-A to 97-A, 103-A). The court made no reference to the recorded conversations, which it had previously admitted only for the limited purpose of determining whether the plea bargain had been breached (S. Tr. 218-219).

5. Petitioner erroneously asserts that the decision below is inconsistent with the Third Circuit's prior decisions in *United States* v. *Morrison*, 602 F.2d 529 (3d Cir. 1979), cert. granted, No. 79-395 (June 30, 1980), and *United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978). Petitioner's assertion is ill-founded in that those cases both involved situations in which the existence of a valid attorney-client relationship was not at issue. Because petitioner is unable to prove the existence of any attorney-client privilege that could survive his on-going fraud, the holdings of those cases are inapposite, and this Court's decision in *Morrison* could not affect the outcome here.[5]

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[5] We reiterate in this connection that this case is presently at an interlocutory stage. Accordingly, even in the unlikely event that this Court's decision in *Morrison* could have some relevance to petitioner's situation, there is no reason to delay further proceedings in the district court pending disposition of *Morrison*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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